

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 24

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

Ex parte LIN L. CHOU

Appeal No. 95-3083  
Application 07/934,944<sup>1</sup>

HEARD: February 27, 1996

MAILED

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PAT.&T.M. OFFICE  
BOARD OF PATENT APPEALS  
AND INTERFERENCES

Before LYDDANE, MEISTER, and FRANKFORT, Administrative Patent Judges.

FRANKFORT, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the refusal of the examiner to allow claims 1-3 and 6-9 which were amended subsequent to the final rejection in a paper filed February 16,

<sup>1</sup> Application for patent filed August 25, 1992. According to appellant, this application is a continuation-in-part of Application Serial No. 07/894,019, filed June 5, 1992.

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1994 (Paper No. 7).<sup>2</sup> Claims 4 and 5 have been canceled. No claim has been allowed.

Appellant's invention is directed to a panel wall wading or swimming pool. The subject matter before us on appeal is illustrated by reference to independent claim 1, a copy of which, as found in the Appendix to the main brief (Paper No. 13), is appended hereto.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Nacht et al (Nacht)	841,170	Jan. 15, 1907
Salmons (British)	1,251,094	Oct. 27, 1971
Ludwig (German) <sup>3</sup>	2226128	Dec. 06, 1973

In addition to the foregoing, the examiner has relied upon appellant's statement of admitted prior art at page 1, lines 12-23 of the specification relating to the known use of horizontal heat seals in the construction of inflatable swimming pool walls.

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<sup>2</sup> The amendment after final rejection (Paper No. 7, filed February 16, 1994) has been approved for entry by the examiner (see the advisory action of Paper No. 8, mailed March 1, 1994). It is noted, however, that such amendment has not been entered clerically. This panel of the Board will review the claims as if the aforementioned amendment has been made to the claims. The examiner should ensure that this amendment is properly entered during any subsequent prosecution of the application.

<sup>3</sup> Our understanding of this German language document is based upon a translation supplied by appellant as an attachment to Paper No. 4, filed October 4, 1993.

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Claims 1-3 and 6-9 stand rejected under 35 U.S.C. § 103 as being unpatentable over Ludwig in view of Salmons, the admitted prior art and Nacht.<sup>4</sup>

Reference is made to the Examiner's Answer (Paper No. 15, mailed November 7, 1994) for the examiner's complete reasoning in support of the above noted §103 rejection. Appellant's arguments thereagainst are found in the main brief (Paper No. 13, filed August 29, 1994) and in the reply brief (Paper No. 18, filed February 6, 1995).

#### OPINION

After consideration of the positions and arguments set forth by both the examiner and appellant, we have concluded that the combined teachings of the prior art relied upon by the examiner fail to establish a *prima facie* case of obviousness with respect to the claimed subject matter defined in appellant's independent claims 1 and 9. This being the case, we will not sustain the examiner's rejection of claims 1 and 9 under 35 U.S.C. 103, or that of claims 2, 3 and 6-8 which depend from

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<sup>4</sup> Although we find no statement from the examiner that he has expressly withdrawn the rejection of claims 1-3 and 6-9 under 35 U.S.C. 112, second paragraph, set forth on page 2 of the final rejection (Paper No. 6), a review of the record reveals that appellant's comments on page 5 of the main brief (Paper No. 13) regarding such rejection are correct and that this rejection has in fact been withdrawn.

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independent claim 1. Our reasoning for this determination follows.

Before addressing the examiner's rejection based on prior art, it is an essential prerequisite that the claimed subject matter be fully understood. Accordingly, we first direct our attention to appellant's independent claims 1 and 9 to derive an understanding of the scope and content thereof.

Claim 1 is directed to a "panel wall pool," while claim 9 is more specifically directed to a "collapsible panel wall wading pool." Each of these pools is said to include a bottom wall and a peripheral upright wall connected to the bottom wall. In each case, the upright wall is described as being made of at least two layers of heat sealable material and as containing a plurality of spaced apart, vertically oriented pockets "sealed at the bottom and top edges of said upright wall." A plurality of rigid, generally rectangular planar panels are recited as being disposed within said upright wall, with each of the panels being "sealed in one of said pockets." A plurality of heat seal regions are then defined, with each region being positioned between two adjacent spaced apart pockets. Each heat seal region includes a plurality of vertical heat seals and a plurality of horizontal heat seals extending between the vertical heat seals. Claims 1 and 9 then set forth the limitation of "each of said vertical heat seals being common with a corresponding vertical

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heat seal of an adjacent pocket." Since there has been no positive recitation in claims 1 and 9 of a "vertical heat seal" for the vertically oriented pockets, we construe the above-noted language to connote that the vertical heat seals of each heat seal region actually define the vertical sealed edges of the adjacent pockets and are therefore "common" therewith as claims 1 and 9 require. We note that Figure 4 of appellant's drawings appear to show this relationship, wherein the vertical heat seals (26a, 26b) of each of the heat seal regions also serve as the vertical seals for the adjacent pockets (23).

Claims 1 and 9 further define a reinforcing band (32) positioned between the two layers of material (16, 18) making up the peripheral upright wall, with claim 9 specifically indicating that the reinforcing band is for encircling the planar panels and that the band is "heat sealed to said vertical heat seals." An inflatable top ring (36) is defined as being connected to the top edge of the peripheral upright wall.

With the above understanding of the claimed subject matter, we turn to the examiner's rejection of claims 1-3 and 6-9 under 35 U.S.C. 103 and observe that the initial burden of establishing a basis for denying patentability to a claimed invention rests upon the examiner. See *In re Piasecki*, 745 F.2d 1468, 223 USPQ 785 (Fed. Cir. 1984). We note that in

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establishing a *prima facie* case of obviousness under 35 U.S.C. §103, it is incumbent upon the examiner to provide a reason why one of ordinary skill in the art would have been led to modify a prior art reference to arrive at the claimed invention. See *Ex parte Clapp*, 227 USPQ 972 (BPAI 1985). To this end, the requisite motivation must stem from some teaching, suggestion or inference in the prior art as a whole or from the knowledge generally available to one of ordinary skill in the art and not from the appellant's disclosure. See, for example, *Uniroyal, Inc. v. Ridkin-Wiley Corp.*, 837 F.2d 1044, 5 USPQ2d 1434 (Fed. Cir. 1988). If the examiner fails to establish a *prima facie* case, the rejection is improper and will be overturned. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988).

In the present case, the prior art to Ludwig discloses a collapsible panel wall pool having a bottom wall and a peripheral upright wall containing a plurality of spaced apart, vertically oriented pockets (24, 26). A plurality of planar panels (36) are provided, with each panel being located in one of said pockets (24). In addition, Ludwig also discloses reinforcing bands (40) positioned for encircling the planar panels, and that these bands are heat sealed to the vertical heat seals of the pockets (24). An inflatable top ring or border bead (38) is provided and connected to the top edge of the peripheral upright wall. See Figures 1 and 2 of Ludwig.

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However, unlike the pool defined in appellants' claims on appeal, Ludwig's pockets (24, 26) are intentionally not sealed at the top so as to thereby render the planar panels or skeleton boards (36) of each pocket (24) removable for collapsing and folding of the pool. Moreover, the reinforcing bands (40) of Ludwig are not located "between" the two layers of material (16, 18) defining the upright wall therein, and there are no heat seal regions of the type defined in appellant's claims on appeal positioned between adjacent pockets (24).

Salmons is relied upon by the examiner for a teaching of a panel wall pool wherein the vertically oriented pockets of the peripheral upright wall (2) which carry the panels (3) therein, are sealed about the entire perimeter of each pocket, and particularly at the top of the pockets. Horizontal heat seals are imported by the examiner from appellant's admitted prior art at page 1, lines 12-23 of the specification. In addition, from the examiner's perspective, a teaching of having rings disposed between layers of material making up a receptacle may be found in the basket of Nacht, wherein rings or ribs (4) are positioned between the two layers of canvas defining the side wall of the basket therein.

Even if we might agree with the examiner that the combined teachings of Ludwig and Salmons would have been

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suggestive to the artisan of a panel wall pool wherein the planar support panels are each sealed within respective vertically oriented pockets, we find no fair teaching in the applied admitted prior art (specification, page 1) for the examiner's position regarding the heat seal regions between the adjacent pockets of the particular type defined in appellant's claims 1 and 9 on appeal. In this regard, we agree with the arguments presented by appellant in paragraph (c) on page 11 and on pages 12 and 13 of the main brief. With respect to the examiner's combination of Ludwig and Nacht, we find that we are in agreement with appellant's position that one seeking to improve the panel wall bathing and wading pool of Ludwig would not have fairly looked to the market basket of Nacht and, even if they did, there is no reasonable teaching, suggestion or incentive in these applied references for the combination proposed by the examiner.

In the final analysis, it is our opinion that the examiner has impermissibly used appellant's own disclosure and claims as an instruction manual or template to piece together isolated disclosures and teachings of the prior art so that appellant's claimed subject matter may be rendered obvious. As our Court of review made clear in In re Fritch, 972 F.2d 1260, 23 USPQ2d 1780 (Fed. Cir. 1992), this approach to an obviousness determination cannot be sanctioned. Since we have determined



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that the examiner's conclusion of obviousness is based on a hindsight reconstruction using appellant's disclosure as a blueprint to arrive at the claimed subject matter from disparate teachings in the prior art, it follows that we will not sustain this rejection of the appealed claims under 35 U.S.C. 103.

The decision of the examiner rejecting claims 1-3 and 6-9 is reversed.

REVERSED

*Will. E. Lyddane*

WILLIAM E. LYDDANE )  
Administrative Patent Judge )

*James M. Meister*  
JAMES M. MEISTER )  
Administrative Patent Judge )

BOARD OF  
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APPENDIX

1. A panel wall pool, comprising:

a bottom wall having an outer edge;

a peripheral upright wall connected to the outer edge of the bottom wall, said peripheral upright wall being formed of at least two layers of heat sealable material and containing a plurality of spaced apart, vertically oriented pockets sealed at the bottom and top edges of said upright wall;

a plurality of rigid, generally rectangular planar panels disposed within said peripheral upright wall, with each of said panels being sealed in one of said pockets;

a plurality of heat seal regions each positioned between two of said plurality of spaced apart pockets, with each heat seal region including a plurality of vertical heat seals and a plurality of horizontal heat seals extending between each of said vertical heat seals for providing support to said upright wall, each of said vertical heat seals being common with a corresponding vertical seal of an adjacent pocket;

a reinforcing band positioned between said two layers of material for encircling said planar panels; and

an inflatable top ring connected to the top edge of the upright wall.